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FILED
JUN 23 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 202.

314-640

NEW AMSTERDAM CASUALTY COMPANY,
PETITIONER,

VS.

THE MIAMI CONSERVANCY DISTRICT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment and decree of the Circuit Court of Appeals for the Sixth Circuit, entered after a denial of rehearing on April 12, 1941, reversing the judgment and decree of the District Court of the United States for the Southern District of Ohio, Western Division.

OPINION.

The opinion of the trial court appears in the record, page 54. The opinion of the circuit court of appeals is published in Federal Reporter 118 (2d), at page 604 (also R. p. 78).

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended.

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed on March 14, 1941. A petition for rehearing was filed on March 28, 1941. An order denying the petition for rehearing was filed on April 12, 1941. Order amending order for mandate and entering judgment was filed on April 17, 1941.

BASIC QUESTIONS INVOLVED.

The basic questions involved in this case are:

A. When a surety contract contains provisions designated "conditions," and the state law at the time of the formation of the surety contract prevents such provisions from operating as conditions, shall such provisions be interpreted as contractual promises against the admitted violator thereof?

B. Will a public corporation, in the absence of a restrictive statute, contractually bind itself to the surety on a construction contract, both by providing in the construction contract that the terms of the bond shall be a part of said construction contract, and by accepting a bond which likewise provides that the terms of the construction contract shall be a part of said bond?

C. Is a public corporation, in the absence of a restrictive statute, which lawfully assumes a position of obligee on a construction contract bond, sub-

ject to the normal *quasi* contractual obligations growing out of the relationship of surety and obligee?

D. When by statute a creditor of a bonded contractor may either procure a lien against the funds retained by the owner, or sue the contractor's surety, and such creditor elects to sue the surety, is the surety who pays such claim entitled to subrogation against the obligee-owner who wrongfully pays the contractor?

The district court decided these questions in the affirmative; the court of appeals in the negative.

STATEMENT OF FACTS.

The Miami Conservancy District is a public corporation created for the purpose of controlling the surface drainage of the Great Miami River Valley in Ohio. Sections 6828 to 6828-79 of the Ohio General Code control its creation and operation. The portions of said sections pertinent to this litigation are as follows:

Section 6828-6. "The district shall be a political subdivision of the State of Ohio, a body corporate with all the powers of a corporation, shall have perpetual existence, with power to sue and be sued; to incur debts, liabilities and obligations; to exercise the right of eminent domain and of taxation and assessment as herein provided; to issue bonds and to do and perform all acts herein expressly authorized and all acts necessary and proper for the carrying out of the purposes for which the district was created, and for executing the powers with which it is invested."

Section 6828-74. "This act * * * shall be liberally construed."

On April 14, 1932, the district entered into a contract with the Ward-Hayes Construction Company to dredge a section of the Miami River for a consideration of 31 cents per cubic yard. Pursuant to Section 6828-16 of the Ohio

General Code, the District required said contractor to furnish a bond, upon which the petitioner became surety in the amount of $124,000. Said bond provided (R. p. 42) that the work contract, plans, and specifications were made a part of said bond (line 23, Exhibit B).

The bond also provided, in its so-called "condition," that the obligee should make all retentions "which said contract specifies the obligee *shall* or *may* retain * * * (but not less in any event than 10%) * * * until the time within which liens or notices of liens may be filed" (fourth condition, Exhibit B).

Section 8324 of the Ohio General Code, pertaining to liens on public contracts, provides:

> "Any subcontractor, materialman, laborer, or mechanic who has performed labor or furnished material, fuel, or machinery * * * for the construction, improvement, or repairs of any turnpike, road improvement, sewer, street, or other public improvement * * * *at any time not to exceed four months* from the performance of the labor, or the delivery of the machinery, fuel or material, may file with the owner, board, or officer * * * a sworn and itemized statement of the amount and value of such labor * * * material, fuel, or machinery."

Section 8325, Ohio General Code, provides that following such notice a lien shall exist against all unpaid balances.

The work contract likewise provided that the terms of the bond should be a part of said contract (R. p. 27); and that the contractor "at his own sole cost and expense should perform all labor and furnish all necessary materials" (R. p. 25).

The retentions which the contract stipulates the district *shall* make from the monthly progress payments (R. p. 34. Par. 17) are:

1. The value of all excavations more than six inches below grade, or beyond the limits (R. p. 41).

2. Twenty per cent of the value of the work done until final payment (R. p. 34).

The retentions which the contract provides the district *may* make are:

1. Such amount as may be necessary to meet unpaid labor or material bills "until satisfactory evidence be furnished that all liabilities have been fully discharged" (R. p. 33).

2. The final payment for thirty days after acceptance of the job (R. p. 35).

By the admitted facts, the district retained only a portion of those amounts which the contract expressly said it *should* retain, and no part of the amounts which the contract said it *might* retain. Neither did the district retain 10% of the value of the work until the lapse of the four-month statutory period allowed for filing lien notices. No effort was made by the district to procure evidence of the payment of labor and material bills other than to get such a statement from the Ward-Hayes Construction Company itself.

All actual excavation was completed by January 11, 1933 (R. p. 17), at the date of the eighth payment, yet no deductions whatsoever for overdepth excavation had yet been made. This entire deduction for 26,858 yards, amounting to $8,325.98, was all taken from the tenth payment. If this amount had been deducted, as the contract required during the course of the excavation, the seventh payment would have been reduced by $1,313.87, and the eighth payment of $7,612.11 could not have been made at all. There being no excavation whatsoever between the eighth and ninth estimate payments, the ninth payment of $7,500 also violated the contract. By these errors the contractor was overpaid during the running of the contract $15,825.98; the amount of the final payment

was $7,500 too small; and four out of the ten disbursements violated the contract (R. p. 18).

The work was approved on March 23, 1933, and the final payment made two days later (R. p. 19). This check was diverted by the contractor's banker, to its own claim, leaving unpaid labor and material bills in the amount of $11,750.75. The claimants made no effort to procure a lien against funds in the hands of the district, but proceeded directly against the surety. On July 28, 1933, the surety notified the district of these claims (R. p. 20).

Judgment was subsequently rendered in favor of the claimants against the surety in the Ohio Court of Appeals, which decision is reported in 5 Ohio Opinions, page 81. The surety promptly demanded reimbursement from the district, which payment was refused, and suit was brought against the district in the Federal District Court for the Southern District of Ohio. The first cause of action in the amended petition is at law for damages for failure to make the retentions as required by the work contract *and* the bond as mutually incorporated in each other. The second cause of action is in equity, based upon the violation by the district of its *quasi* contractual obligations as an obligee to its surety in that it failed to make the retentions provided solely in the work contract to the injury of the surety.

The district court below gave plaintiff judgment on both causes of action. The circuit court below reversed this judgment. These divergent conclusions, involving all of the basic questions above, resulted from the circuit court's refusal to give any effect to the "conditions" in the bond; its complete ignoring of the fact that the bond was incorporated in and by the work contract; and its giving no consideration whatsoever to any violation of the work contract by the district obligee as affecting the rights of the surety; because, as stated in its decision:

> "The contract was between the district and the construction company and not between the district

> and the surety. * * * It is doubtful that a public body whose contractual powers are limited, may be made liable as to (d) private parties in relations *quasi ex contractu.*"

We submit that the district court followed recognized precedents in the law of suretyship. The circuit court bblazed a wholly new trail!

REASONS FOR GRANTING THIS PETITION.

1. The decision of the circuit court of appeals herein is in conflict with the decisions of other circuits.

2. The questions involved herein are most important to every unit of local government in the United States, and to every bonding company signing public construction bonds. These questions have not been, but should be, settled by this court.

3. The circuit court of appeals decided this case contrary to its own precedents but in attempted conformity to an Ohio Court of Appeals decision which was rendered after the rights of the parties herein had fully accrued, and which did not correctly state Ohio law.

A brief presenting petitioner's arguments is hereto attached.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

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